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Dana T. Blackmore[*]

I. Introduction

The best way to determine how effectively a legal system works is to determine how it handles precedent.[1] It is a common Anglo-American principle of jurisprudence that like cases should be decided alike. The principle of *stare decisis* – of abiding by previous decisions[2] – is widely practiced by American communities. However, *stare decisis* is not exercised in international law.[3] More specifically, the principle of *stare decisis* is not exercised in World Trade Organization (WTO) jurisprudence.

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1 *See* D. Neil MacCormick & Robert S. Summers, *Introduction* to INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 1, 1 (D. Neil MacCormick & Robert S. Summers eds., 1997).

2 Olav A. Haazen, *Precedent in the World Court*, 38 HARV. INT'L L.J. 587, 587 (1997) (reviewing MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT (1996)).

> Traditionally, the meaning of *stare decisis* is that judges are 'obliged to follow a previous case although they have what would be otherwise good reasons for not doing so.' Thus, the doctrine can also be stated as the absence of a right to review the correctness of the legal principles adopted and applied in a precedent.

Id.

3 *See id.* at 588 (stating, for example, that "[i]n the World Court, the rule of *stare decisis* does not apply," where the World Court refers to the International Court of Justice).

The WTO[4] embodies one of the most sophisticated international legal systems in all of international law, due, for the most part, to its dispute settlement mechanism.[5] The WTO Agreement replaced the 1944 General Agreement on Tariffs and Trade (GATT).[6] GATT was intended to operate as a temporary international trade agreement during the creation and ratification of the International Trade Organization (ITO); however, the ITO was never created because of difficulties amongst diverging views in the United States Congress.[7] As such, GATT continued to serve as the authority on international trade for more than fifty years until the WTO was established in 1995 during the final "Uruguay Round" negotiations of GATT.[8]

The WTO is not just an extension of GATT, but a complete replacement of it, embodying procedures for the prompt and effective settlement of disputes in all policy areas.[9] The Uruguay Round established dispute settlement procedures for the WTO known as the Understanding on Rules and Procedures Governing

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[4] *See* JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS, AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS 289 (3d ed. 1995) (noting that "[t]he Uruguay Round results create a new and better defined international organization and treaty structure – a World Trade Organization (WTO) – to carry forward GATT's work"); *see also* Susan Tiefenbrun, *Free Trade and Protectionism: The Semiotics of Seattle*, 17 ARIZ. J. INT'L & COMP. L. 257, 267-68 (2000).

> The WTO is the principal international agency overseeing and administering the rules of international trade .... The four primary organs are the Ministerial Conference, the General Council, the Secretariat, and the Director General .... Its principal purposes include the development of a durable multilateral trading system, the reduction of tariffs and barriers to trade, the elimination of discrimination in trade relations, and the expanded production of trade in goods and services.

Id.

[5] *See* Raj Bhala, *The Power of the Past: Towards* De Jure Stare Decisis *in WTO Adjudication (Part Three of a Trilogy)*, 33 GEO. WASH. INT'L L. REV. 873, 894 (2001).

[6] *See* Sean P. Feeney, *The Dispute Settlement Understanding of the WTO Agreement: An Inadequate Mechanism for the Resolution of International Trade Disputes*, 2 PEPP. DISP. RESOL. L.J. 99, 99 (2002).

[7] *Id.* at 100.

[8] *See id.*

[9] INTERNATIONAL TRADE DATA SYSTEM, THE WORLD TRADE ORGANIZATION (WTO) AND DISPUTE SETTLEMENT PROCEDURES, *available at* http://www.itds.treas.gov/WTO_dispute.htm (last updated Dec. 19, 2002) [hereinafter WTO 2002].

the Settlement of Disputes (DSU).[10] It is believed that the WTO was instituted to eradicate the troubled system that evolved under GATT.[11]

This author believes that GATT's watered-down deterrent effect is one of the key problems relating to its process of dispute settlement. GATT dispute settlement operated under a negotiation/consensus system which did not promote compliance with GATT rules.[12] This author believes that this problem will develop within the WTO if it does not institute a system of *stare decisis* within its dispute settlement process. If this is not done, this author strongly believes that the WTO dispute settlement process will begin to become infected by the history of problems that plagued the GATT.

Stare decisis means to stand firmly by things that have been decided – and not to disturb them.[13] In other words, *stare decisis* means that a court must decide cases in accordance with applicable precedent.[14] The doctrine of *stare decisis* was excluded from the pre-Uruguay Round GATT dispute settlement system and continues to be absent from the post-Uruguay Round WTO system.[15]

After providing a historical backdrop of GATT dispute settlement and an overview of the Dispute Settlement Process, this article will determine whether *stare decisis* exists within the WTO. This article will further provide an understanding of how differences between the common law and civil law systems of jurisprudence affect the issue of *stare decisis*. This article will then focus on defining *stare decisis*, determining why a system of *stare decisis* is needed in WTO dispute settlement, and, finally, suggesting how such a system should be instituted within the WTO. This article will conclude by focusing on the benefits and

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10 *Id.*

11 *See* JACKSON ET AL., *supra* note 4, at 305.

12 *See id.* at 332.

13 RUSS VERSTEEG, ESSENTIAL LATIN FOR LAWYERS 159 (1990).

14 *See* 2 SIR GERALD FITZMAURICE, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE 583-84 (1986) (discussing the use of precedent in International Court of Justice decisions).

15 Raj Bhala, *The Myth About* Stare Decisis *and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845, 849 (1999).

draw backs of instituting a system of *stare decisis* within WTO dispute settlement and determining the best way to go about instituting *stare decisis* within the WTO dispute settlement process.

II. Historical Backdrop

The DSU is the legal procedure that spells out the rules for settling disputes within the WTO.[16] "The purpose of the WTO DSU is to provide for an efficient, dependable and rule-oriented system to resolve, within a multilateral framework, disputes arising in relation to the application of the Marakesh Agreement Establishing the WTO."[17] The DSU has been referred to as the backbone[18] of the WTO trading system.[19] Furthermore, the DSU is the exclusive and ultimate means of enforcing the WTO's trade regulations.[20] This is why this author strongly believes that a system of *stare decisis* should be instituted – as a means of providing more stability in a system that is so important. The DSU contains twenty-seven articles and is a legally binding negotiated agreement amongst the various WTO member

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16 WORLD TRADE ORGANIZATION, REVIEW OF THE DISPUTE SETTLEMENT UNDERSTANDING, *available at* http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/19dis_e.htm (last visited Jan. 10, 2004) [hereinafter REVIEW].

17 *See* WORLD TRADE ORGANIZATION, DISPUTE SETTLEMENT MECHANISM: OVERVIEW: PURPOSE, *available at* http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto08/wto8_17.htm (last visited Jan. 10, 2004).

18 REVIEW, *supra* note 16.

19 *See* Chakravarthi Raghavan, *The World Trade Organization and Its Dispute Settlement System: Tilting the Balance Against the South (Trade and Development Series No. 9)*, *in* THIRD WORLD NETWORK 1 (2000) ("The Dispute Settlement Understanding (DSU) has been the flagship of the World Trade Organization (WTO), proclaimed as the most important pillar of the rules-based WTO system . . . . [T]he *supposed benefits* of such an effective dispute settlement system were one of the main persuasive factors for several developing countries to agree to the Uruguay Round agreements.") (emphasis added), *available at* http://www.twnside.org.sg/title/tilting.htm (last updated Dec. 19, 2003).

20 REVIEW, *supra* note 16; *see also* WORLD TRADE ORGANIZATION, DISPUTES: THE DISPUTE SETTLEMENT SYSTEM (briefing notes from the Doha WTO Ministerial Conference 2001) (stating that after six years of operation, WTO members continue to make extensive use of the WTO dispute settlement system), *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief17_e.htm (last visited Jan. 10, 2004).

governments.[21]

The 1994 Marakesh Ministerial Conference mandated WTO member governments to conduct a review of the WTO DSU within four years of its initiation.[22] This review was to be based on how the DSU operated during the period from January 1995 to July 1999.[23] The Dispute Settlement Body (DSB) started this review in late 1997 and many, if not all, members felt that improvements should be made to the understanding; however, the DSB could not reach a consensus.[24] The Doha Declaration mandated negotiations with the aim of concluding an agreement.[25]

III. Overview of the WTO Dispute Settlement Process

The highest level of authority within the WTO is the Ministerial Conference, which is composed of representatives of all WTO members.[26] The day-to-day work of the WTO is carried out by the General Council, which is also composed of all WTO members.[27] The General Council reports to the Ministerial Conference. The General Council convenes in two forms: 1) as the DSB to oversee the dispute settlement process; and 2) as the Trade Policy Review Body.[28] "The DSB is solely authorized to establish panels, adopt panel and appellate reports, maintain surveillance of implementation or rulings and recommendations, and authorize retaliatory measure in cases of non-implementation of recommendations."[29]

"Disputes in the WTO arise when one government accuses another of violating an agreement or being in breach of its commitments."[30] The WTO dispute settlement process includes

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21 REVIEW, *supra* note 16.

22 WORLD TRADE ORGANIZATION, THE DOHA DECLARATION EXPLAINED: DISPUTE SETTLEMENT UNDERSTANDING, *at* http://www.wto.org/english/tratop_e/dda_e/doha explained_e.htm (last visited Jan. 10, 2004) [hereinafter DOHA].

23 REVIEW, *supra* note 16.

24 DOHA, *supra* note 22.

25 *Id.*

26 WTO 2002, *supra* note 9.

27 *Id.*

28 *Id.*

29 *Id.*

30 REVIEW, *supra* note 16.

three stages: (1) consultations; (2) the legal stage; and (3) implementation.[31] This writing deals more with the legal stage of the process wherein a dispute is examined by an independent panel of three legal/technical experts.[32] Although the panels are considered to be much like tribunals, unlike tribunals the panelists are usually chosen in consultation with the countries involved in the dispute.[33] When the countries cannot agree on the composition of the panelists, the WTO Director General has the authority to appoint panelists, although the Director General rarely exercises this power.[34] The panelists may be chosen from a permanent list of candidates or from elsewhere.[35] Purportedly, the panelists serve in their individual capacities and cannot receive instructions from any government.[36] The panel's official responsibility is to assist the DSB in making rulings and recommendations.[37] However, since the panel's report can only be rejected by a consensus in the DSB, the panel's rulings and recommendations are difficult to overturn.[38]

The WTO dispute settlement mechanism gives the possibility of appeal to either party in a proceeding.[39] "Appeals are heard by a standing Appellate Body established by the DSB."[40] This Appellate Body is composed of seven persons, which represent a broad range of the WTO's membership.[41] Members of the Appellate Body serve four-year terms and must be individuals who possess a recognized presence in the field of international trade law.[42] In addition, members of the Appellate Body are not affiliated with any government.[43] Appeals are said to be based on

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31 *See id.*

32 *Id.*

33 WTO 2002, *supra* note 9.

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

38 WTO 2002, *supra* note 9.

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 WTO 2002, *supra* note 9.

legal points such as legal interpretation because they cannot be based on the reexamination of existing evidence or the examination of new evidence.[44] An appeal can uphold, modify, or reverse the panel's legal findings and conclusions.[45] The only way that the DSB can reject an Appellate Body report is by consensus.[46]

GATT rules apply to trade in goods.[47] The WTO Agreement applies to trade in goods, trade in services, and trade-related aspects of intellectual property rights.[48] Dispute decisions of GATT could not be enforced if a member government chose to disregard them.[49] In contrast, the WTO decisions by the dispute panels or the appellate body cannot be blocked by a country which loses its case.[50] Under GATT, decisions were adopted by unanimity, whereas a unanimous vote is required to block a decision of the DSB.[51] Where the GATT dispute settlement system did not include an appellate stage, the WTO dispute settlement process includes a permanent appellate body to review findings of the dispute settlement panels.[52] "The WTO dispute settlement process has specific time limits and is faster than the GATT system."[53] It is said to operate more automatically, ensuring less blockages than the old GATT system.[54]

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44 *Id.*

45 *Id.*

46 *Id.*

47 WTO vs. GATT: Main Differences, *available at* http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto01/ wto1_8.htm (last visited Feb. 27, 2003) [hereinafter Main Differences].

48 *Id.*

49 WTO - Official Ministerial Website - Disputes - What's at Stake?, *available at* http://www.wto.org/english/ thewto_e/minist _e/min99_e/English/book_e/stak_e_4.htm (last visited Feb. 27, 2003).

50 *Id.*

51 Frieder Roessler et al., *Performance of the System IV: Implementation*, 32 INT'L LAW. 789 (Fall 1998); *see also* Bhala, *supra* note 15, at 867 (noting that pre-Uruguay Round GATT dispute settlement system panel reports were adopted by a consensus, while in contrast, under the WTO DSU, panel and Appellate Body reports are adopted automatically unless there is a consensus against such adoption).

52 Main Differences, *supra* note 47.

53 *Id.*

54 *Id.*

IV. What is *Stare Decisis*?

Stare decisis originates from medieval England and is believed to be the "cornerstone" of English common law.[55] Under the doctrine of *stare decisis*, "decisions or principles of law that emerge from a case are binding rule of law in the same court or in courts of lower rank, where the issue in controversy or the relevant facts of subsequent cases are substantially similar."[56] The United States Supreme Court, which is the court of last resort in the United States, can deviate from *stare decisis* and overrule precedent, although it must examine its own precedent.[57] A large portion of the influence of *stare decisis* is derived from "nature of the controversy," whether the issue is constitutional, statutory, or common law.[58] For the most part, the Supreme Court will not overrule a decision concerning the construction or interpretation of a federal statute due to the fact that Congress has the ability to "alter a statutory court decision and rectify it by legislation."[59]

Two schools of thought exist regarding *stare decisis* – strict and liberal.[60] Under the strict school of thought, "a court is bound by both its previous decisions and those of all higher courts," unless the facts of the case are different.[61] On the other hand, pursuant to the liberal school of thought, "societal innovations, legal progressions, and erroneous decision-making" are taken into account "providing a court with greater flexibility."[62]

V. The Effect of the Difference Between Common Law and Civil Law Systems on the Issue of the Existence of *Stare Decisis* Within WTO Dispute Settlement

The difference between common law and civil law systems

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55 Mei-Fei Kuo & Kai Wang, *When Is An Innovation in Order? Justice Ruth Bader Ginsburg and* Stare Decisis, 20 HAWAII L. REV. 835, 839 (1998).

56 *Id.* at 839.

57 *Id.*

58 *Id.* at 840.

59 *Id.* (pointing out that the Court, in *U.S. Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487 (1994), was reluctant to overrule precedent interpreting a statutory precedent).

60 *Id.* at 841.

61 *Id.*

62 *Id.*

forms the basis for understanding why the issue of the absence of *stare decisis* in the WTO dispute settlement process will probably never be resolved. It is believed that an "examination of *stare decisis* demands a comparison between common law and civil law systems."[63]

One of the classic differences between civil law and common law jurisdictions is that civil law does not recognize judicial precedent as an independent source of law.[64] "In a common law system, judicial decisions constitute part of 'the law.'"[65] In other words, "a common law court decides the case and in the process creates significant law."[66] On the other hand, "a civil code simply states the law, without justification, explanations, comparisons, or examples."[67] As will be seen below, a fundamental difference between the common law and civil law systems regarding statutory interpretation is that in the civil law system, the statute is binding, whereas in a common law system, a prior decision concerning the statute controls.[68] "Because of the absence of *stare decisis* in the civil law tradition, judicial decisions interpreting statutes are not controlling in later cases involving the same statutes."[69] As such, the civil law community cannot comprehend how a common law judge can be a source of law without risking credibility of the system.[70] "The values that promote *stare decisis*

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63 Kuo & Wang, *supra* note 55, at 870; *see also* Jonathan R. Macey, *Symposium on Post-Chicago Law and Economics: The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT. L. REV. 93, 96 (1989) (stating that it simply is not possible to separate a discussion of the value of stare decisis from a discussion of the value of the common law itself).

64 Thomas Lundmark, *Interpreting Precedents: A Comparative Study*, 46 AM J. COMP. L. 211, 214 (1998) (book review).

65 E-mail from Sandford Gaines, Professor of Law, University of Houston School of Law, to Dana T. Blackmore, LL.M. Candidate, University of Houston School of Law (July 15, 2003, 4:44:00 CST) (on file with author).

66 Robert Adriaansen, *Open Forum: At the Edges of the Law: Civil Law v. Common Law: A Response to Professor Richard B. Capalli*, 12 TEMP. INT'L & COMP. L.J. 107, 108 (1998) (indicating that the worth of a common law lawyer is indicated by her knowledge of how to utilize these authorities and apply them to specific set of facts and circumstances).

67 *Id.* at 180.

68 Kuo & Wang, *supra* note 55, at 872.

69 *Id.*

70 Adriaansen, *supra* note 66, at 108 (stating that it is difficult "to explain the civil

in the common law tradition are the same that repress *stare decisis* in the civil law tradition."[71] The civil law community erroneously thinks of precedents as the published case; however, one is better served by examining the hierarchical structure of both statutory and case law in understanding *stare decisis*.[72] Civil law systems are also known as code systems where codes and auxiliary statutes are the main body of "the law."[73] In civil law systems, the courts apply and interpret the codes and statutes, whereas in common law systems, the court must follow previous decisions unless there is a compelling reason not to do so. Judges characterize *stare decisis* as a precept for judges to "keep to what has been decided previously."[74]

A. Common Law Jurisdictions

The United States and the United Kingdom explicitly follow precedents.[75] Moreover, one of the most distinctive features of the common law system is the rule of precedent or *stare decisis*.[76] In this regard, lower courts adhere to a strict doctrine of precedent (vertical *stare decisis*) and appellate courts consider their own precedents to be "defeasible" for good reasons (horizontal *stare decisis*).[77] The United Kingdom legal community defends *stare decisis* as predictable, efficient, and legitimate.[78]

"The common law is an enormous body of rules."[79] In a common law system, some form of *stare decisis* is a necessary byproduct of the legal process itself. The doctrine of *stare decisis* encompasses common law, as well as constitutional and statutory

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law to a common law lawyer or the common law to a civil law lawyer").

71 Kuo & Wang, *supra* note 55, at 871.

72 Adriaansen, *supra* note 66, at 108.

73 E-mail from Sandford Gaines, Professor of Law, University of Houston School of Law, to Dana T. Blackmore, LL.M. Candidate, University of Houston School of Law (July 15, 2003, 4:44:00 CST) (on file with author).

74 Haazen, *supra* note 2, at 587.

75 Lundmark, *supra* note 64, at 212.

76 Haazen, *supra* note 2, at 587.

77 Lundmark, *supra* note 64, at 212.

78 *Id.* at 220.

79 Kuo & Wang, *supra* note 55, at 839.

precedent.[80] In common law jurisdictions, *stare decisis* is exercised to varying degrees. This exercise is affected by the different sources of law – constitutional, statutory, and common law.[81] Precedents interpreting statutes have greater force than common law precedents, which then have greater force than precedents interpreting state constitutions.[82] As far as the construction of constitutions are concerned, American courts feel that the policies and principles served are more important than the stability provided by precedent, especially in light of the fact that it is quite difficult to amend the American Constitution.[83] In interpreting statutes, American judges often adhere to a precedent even if they strongly criticize the result because they believe that it is the business of the legislature to modify the rule.[84] Common law is thought to "become more concrete and certain as the law progresses."[85] Furthermore, it has been recognized as a more "superior system of doing justice"[86] than civil law.

B. Civil Law Jurisdictions

The civil law system is governed by statute rather than case law.[87] Civil law judgments do not function as precedents and *stare decisis* is said to not exist.[88] Nevertheless, proponents of the civil law system vehemently proclaim that they accord respect and deference to judicial precedents and the normative power of precedents is strongly felt whether or not judge-made law is considered a separate source of law.[89] The French do not require their highest courts to follow their own precedent, but they are said

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80 *Id.*

81 Lundmark, *supra* note 64, at 213.

82 *Id.*

83 *Id.*

84 *Id.*; *see also* Kuo & Wang, *supra* note 55, at 861 (noting that "Justice Ginsburg believes that *stare decisis* requires the adherence to statutory precedents because 'it's more than just the soundness of the reasoning . . . the reliance interests are important").

85 Adriaansen, *supra* note 66, at 112.

86 *Id.* at 113.

87 Kuo & Wang, *supra* note 55, at 871.

88 *Id.* at 872.

89 Lundmark, *supra* note 64, at 215-16.

to always do so in "practice."[90] In Germany, almost all decisions of the highest appellate courts use citations from previous opinions.[91] A forty-six year study revealed that, of the 4,000 German Federal Constitutional Court cases, it departed form precedent in fewer than twelve cases.[92] After the fall of communism, Polish judges and lawyers cited judicial decisions on a wide scale and applicants for the bar and judicial office are often tested on precedents as well as on statutory law.[93] The Supreme Court of Finland seeks through its judicial opinions to guide the application of the law by the lower courts, while the lower courts are not legally bound to follow the Finnish Supreme Court's decisions.[94]

As such, it is clear that to varying degrees, the idea of precedents and *stare decisis* is favored by both common law and civil law systems of jurisprudence. Furthermore, recent studies reveal that judicial decisions are beginning to play as important a role in civil law systems as in they do in common law systems.[95]

C. International Law Jurisdictions

Some scholars believe that international law, and more specifically, the WTO dispute settlement process, is more similar to the civil law system. However, other scholars believe that international law is neither civil law nor common law, and the International Court of Justice (ICJ), commonly referred to as the "World Court," cannot be said to stand distinctly in either one or the other.[96] Whether international law complies more with the civil law system or not, all will agree that the rule of *stare decisis* does not apply to international law.[97] In other words, "decisions of

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90 *Id.* at 215.

91 *Id.*

92 *Id.*

93 *Id.*

94 *Id.*

95 *See, e.g.*, Kuo & Wang, *supra* note 55, at 872 n.310.

96 Haazen, *supra* note 2, at 587.

97 *Id.* at 588 (noting that Shahabuddeen harmonizes positions on the matter by stating that *stare decisis* does not apply in the International Court of Justice, yet "subject to a power to depart, decisions of the Court may be regarded as authoritative").

international tribunals are not a direct source of law."[98] The ICJ is considered to be the "principal judicial organ" of the United Nations. Article 59 of the ICJ Statute states that "a decision of the ICJ has no binding force except between the parties and in respect of the particular case."[99] Article 59 further states that "in a subsequent case involving different parties but involving the same or a similar issue, a prior holding is not binding."[100] Article 59 also states that "even if one of the parties is involved in a subsequent case in which the same or a similar issue arises, a prior holding has no binding force."[101] In addition, Article 38.1(d) of the ICJ Statute, which refers to decisions of tribunals other than the ICJ, expressly admonishes the use of judicial opinions as a binding precedent.[102] It is believed that *stare decisis* does not exist within the ICJ because the binding force of precedent depends on the hierarchy of courts – where there is no hierarchy, no such binding force exists.[103] In this regard, it is thought that "higher courts bind lower courts and courts of co-ordinate authority do not bind each other."[104] Therefore, since there is only one World Court, there is no hierarchy and, as such, no binding precedent.[105] The doctrine of *stare decisis* is also thought to relate to the question of whether

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98 Haazen, *supra* note 2, at 597 (citing OPPENHEIM'S INTERNATIONAL LAW 41 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

99 Raj Bhala, *The Myth About* Stare Decisis *and International Trade Law*, 14 AM U. INT'L L. REV. 845, 863 (1999) (citing the Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055 at 1062, 3 Bevans 1179 at 1190); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 903 cmt. g (1987).

100 Bhala, *supra* note 99, at 863.

101 *Id.*

102 MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 63 (1996).

103 Haazen, *supra* note 2, at 589.

104 *Id.*

> [T]he House of Lords decided in 1898 that it was bound by its own decisions, but abandoned this rule in 1966. The English Court of Appeal has also considered itself bound by its own decisions, but the reason that the court of appeal may do this is not because it has so decided. That would require some prior binding force for that decision. Instead, it grounded its position on authorities from the House of Lords. Therefore, the basis of the Court of Appeal being bound by its decisions lies in hierarchy and the existence of a higher court, not simply in its own precedents.

Id.

105 *Id.*

the highest court, or the sole court, in a legal system can bind itself.[106] If there is no lower international courts upon which the ICJ's decisions could have binding force, then the ICJ's own decisions are not binding upon the ICJ.[107] Some scholars believe that such a horizontal "precedential effect" is illogical because it is difficult to decide to be bound by its own decisions in future cases.[108] In order to be binding, the decision requires a presupposition on the part of the organization to be bound that the decision is binding.[109] Otherwise, "it could be freely withdrawn or overruled with the result that the court is not truly bound."[110] Therefore, it follows that "the rule of precedent cannot be the source of its own authority."[111] Proponents of this line of thinking go so far as to point out that even the highest common law courts reserve the right to depart from their previous decisions.[112] With all of this said, the ICJ's case law is relatively characterized as "authoritative" and having "precedential effect."[113]

In addition, section 102 of the Restatement (Third) of the Foreign Relations Law of the United States indicates that there is no *stare decisis* within the international body of law.[114] Furthermore, that section also states the following: "International law arises from two primary sources – custom and international

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106 *Id.*

107 *Id.*

108 Hazen, *supra* note 2, at 590.

109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.*

113 *Id.*

> [U]nder Article 38, paragraph 1(d) of the Statute of the International Court of Justice, the Court must at least take account of any relevant judicial decision .... [T]he Court has a strong tendency to adhere closely to its previous holdings. As a practical matter, it follows its own case law, advisory opinions and decisions, as well as those of its predecessor, the Permanent Court of International Justice. Even if the Court's decisions are not binding, they are precedents, nonetheless .... [T]hat is not to say that the ICJ ... has ... a rule of precedent, for it does not.

Id. (citations omitted).

114 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(1), cmt. 1 (1987).

agreement, and one secondary source, general legal principles common to the world's major legal systems."[115] This is yet another indication of the absence of *stare decisis* because *stare decisis* does not emanate from any of these sources.

VI. Does *Stare Decisis* Exist Within the WTO Dispute Settlement Process?

To international law practitioners, it is a common understanding that *stare decisis* does not exist within WTO dispute settlement. *Stare decisis* certainly did not exist within the GATT dispute settlement system.[116] Furthermore, based on the aforementioned long-standing tradition of a rule of no-precedent in international law, it naturally follows that *stare decisis* would be absent from the WTO dispute settlement process. As a result of the influence of accepted doctrines of international law, *stare decisis* does not apply to decisions of WTO panels which are not, therefore, binding in future disputes.[117] The *stare decisis* effect on the interpretation of a multilateral treaty is intriguing due to the fact that some member states may operate under civil law systems while others may operate under a common law system.[118]

On one hand, some scholars believe in the existence of a "de facto" (rather than a "de jure") doctrine of *stare decisis*.[119] The doctrine of de facto *stare decisis* suggests that a court or body decides future disputes pursuant to the law of past binding decisions, but in name only. In other words, there is no mandate to do so. Therefore, sometimes the decision-making body could adhere to the doctrine, but it would not have to adhere always to the doctrine. De jure *stare decisis* suggests that a body must

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115 *Id.*

116 Bhala, *supra* note 99, at 870 (noting that GATT dispute settlement has always been viewed as fundamentally a matter between the governments, parties to the dispute. The rulings and conclusions set out in a panel report are considered to apply only to the matter at issue and to the parties involved in the particular case. In prior GATT practice, there was no concept of *stare decisis* – panel reports have not been viewed, strictly speaking, as legal precedents).

117 Arun Venkataraman, *Binational Panels and Multilateral Negotiations: A Two-Track Approach to Limiting Contingent Protection*, 37 COLUM. J. TRANSNAT'L L. 533, 599 (1999).

118 Louis F. Del Duca, 81 AM. J. INT'L L. 465, 466 (1987) (book review).

119 Bhala, *supra* note 99, at 849-50.

decide current cases pursuant to its past decisions unless it overrules itself and makes new precedent.[120]

Then there is the paradox between what is called "persuasive yet non-binding precedent" and "precedent". Professors John Jackson and Davey have concluded that the new DSU does not contain anything that would lead to a view that the legal effect of panel reports is any different from that of the practice of the pre-Uruguay Round era under GATT.[121] This suggests that a *stare decisis* effect of panel reports does not exists, although the panel report remains "persuasive." However, persuasive is not dispositive or forceful.[122] But whether called "persuasive yet non-binding precedent" or just plain "precedent," precedent by its very nature is binding.[123] Precedent means binding decisions of higher courts of the same jurisdiction as well as decisions of the same appellate court.[124]

Some scholars suggest that there is a movement in international dispute resolution away from the "old-fashioned, continental style" towards the Americanized adjudicatory approach.[125] For example, it is believed that WTO decisions have "a binding nature."[126] Currently, however, the rulings and conclusions set out in panel reports apply only to the dispute at issue and to the parties involved in the particular dispute.[127] Despite the fact that panels have regularly referred to, and followed, prior panel reports,[128] distinguishing between de facto

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120 *Id.*

121 *Id.* at 872 (citing JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS (3d ed. 1995)).

122 *Id.* at 873.

123 *Id.* at 875.

124 *Id.* at 920 (quoting D. Neil MacCormick & Robert S. Summers, *Precedent in the United States (New York State)*, *in* INTERPRETING PRECEDENTS 355, 364 (D. Neil MacCormick & Robert S. Summers eds., 1997)).

125 *Id.* at 845, 847.

126 Debra P. Steger, *WTO Dispute Settlement*, *in* THE WTO AND INTERNATIONAL TRADE REGULATION 53, 53 (Philip Ruttley et al. eds., 1998).

127 *Id.*

128 Arun Venkataraman, Note, *Binational Panels and Multilateral Negotiations: A Two-Track Approach to Limiting Contingent Protection*, 37 COLUM. J. TRANSNAT'L L. 533, 599 (1999) (pointing out that WTO panels frequently consider the decisions of past GATT and WTO panels and that such practice has been encouraged by the WTO).

and de jure *stare decisis* and non-binding precedent and precedent is quite frustrating.[129] In the opinion of this author, a system of de facto *stare decisis* is not *stare decisis* at all. So, does the doctrine of *stare decisis* exist within WTO adjudication? Clearly, the answer is no. More specifically, Article 3.2 of the DSU and Article IX.2 of the WTO Agreement infer that GATT panel reports, WTO panel reports, and Appellate Body reports are not to be used as formal sources of law for subsequent disputes.[130] Furthermore, Article XVI.1 of the WTO Agreement provides that the WTO "shall be guided by the decisions, procedures and customary practices followed by GATT in the pre-Uruguay Round era." It has already been established that *stare decisis* did not exist within the pre-Uruguay Round Agreement GATT dispute settlement system.[131] As such, the non-existence of *stare decisis* in international trade law is thought to be virtually "black letter law."[132] It is also believed that the lack of *stare decisis* within the WTO dispute settlement system was simply inherited from the ICJ by the drafters of the International Trade Organization (ITO) Charter and GATT.[133]

VII. The Problem: Is There Need for a System of Binding Precedent/*Stare Decisis* Within the WTO Dispute Settlement Process?

A. Pros

The doctrine of *stare decisis* takes its name from the Latin

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129 Bhala, *supra* note 15, at 875-76.

130 WORLD TRADE ORGANIZATION: UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (Annex 2 to the WTO Agreement), Apr. 15, 1994, art. 3.2 [hereinafter the DSU] (stating that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements"); *see also* Uruguay Round Agreement Establishing the World Trade Organization, April 15, 1994, art. IX, sec. 2, 33 I.L.M. 1144 [hereinafter WTO Agreement] (stating that the Ministerial Conference and General Council are the exclusive organs for rendering a definitive interpretation of a provision of GATT or a Uruguay Round Agreement and establishing that panels and the Appellate Body are empowered to decide matters only for the parties in front of them, not to render interpretations of disputed textual provisions for other WTO members).

131 WTO Agreement, *supra* note 130, art. XVI, sec. 1.

132 Bhala, *supra* note 15, at 885.

133 *Id.* at 885-86.

phrase "*stare decisis et non quieta movere*," which means to "stand by the thing decided and do not disturb the calm."[134] As stated above, *stare decisis* represents the general proposition that a precedent must be followed unless there is a cogent reason to overrule it.[135] "Precedent is defined as courts deciding cases on the basis of principles established in prior cases."[136] A judicial system's collection of precedents is viewed as its principal asset.[137]

As stated above, *stare decisis* is the hallmark of the American common law system.[138] Surely that does not mean that it should be the hallmark of WTO dispute settlement. But such a system is thought to foster stability and certainty.[139] Justice Harlan made the following comments regarding *stare decisis*:

> Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are (1) the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; (2) the importance of furthering fair and expeditious adjudication by eliminating the need to re-litigate every relevant proposition in every case; and (3) the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.[140]

"*Stare decisis* is preferred because it offers evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and

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134 See Amy L. Padden, *Overruling Decisions in the Supreme Court: The Role of a Decision's Vote, Age, and Subject Matter in the Application of* Stare Decisis *After* Payne v. Tennessee, 82 GEO. L.J. 1689 (1994) (quoting James C. Rehnquist, *The Power That Shall Be Vested in a Precedent:* Stare Decisis, *the Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 347 (1986)).

135 *Id.*; *see also* Ronald Kahn, *The Supreme Court as a (Counter) Majoritarian Institution: Misperceptions of the Warren, Burger, and Rehnquist Courts*, 1994 DET. C.L. REV. 1 (1994).

136 BLACK'S LAW DICTIONARY 1176 (6th ed. 1990).

137 *See* William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 250 (1976).

138 *See* Padden, *supra* note 134, at 1689.

139 *See* Vasquez v. Hillery, 474 U.S. 254, 265-66 (1986) (stating that adherence to the doctrine of stare decisis promotes stability, predictability, and respect for judicial authority).

140 Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970).

perceived integrity of the judicial process."[141] *Stare decisis* is thought to be predictable and consistent because it ensures that "the law will not merely change erratically" and permits society to rest assured that "bedrock principles are founded in the law rather than in the proclivities of individuals."[142] "Public confidence in the judicial process, administrative efficiency, and the nature of the controversy at issue also encourage the following of precedent."[143] It is believed that "society's substantial reliance upon a fundamental principle within a decision is one of the most frequently invoked justifications for *stare decisis*."[144] Furthermore, it is believed that "a court can promote stability and certainty in the law by abiding by an established precedent."[145] Additionally, adhering to a rule of *stare decisis* improves society's ability to plan and avoid the results of the unknown by providing a structured and consistent body of law.[146]

Stare decisis also is thought to stand for equality, efficiency, and the appearance of justice.[147] This concept also will foster retention of public confidence in the legitimacy of a court and permit a court to better serve the public because *stare decisis* facilitates a court's ability to function effectively as the ultimate arbitrator of the law in its community.[148] Some commentators believe that through the application of *stare decisis*, a court becomes more effective in earning the respect of the community and generating community adherence to the law.[149] Alexander

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141 *See* Payne v. Tennessee, 501 U.S. 808, 827 (1990); *see also* Kuo & Wang, *supra* note 55, at 850 (indicating that "*stare decisis* promotes systematic consistency by insuring unity across the related areas of law and consensus among the government entities," and "[C]ourts also promote stability and certainty in the law by overruling decisions that are erroneously reasoned or contain an inconsistent constitutional or statutory interpretation.").

142 *See Vasquez*, 474 U.S. at 265.

143 Kuo & Wang, *supra* note 55, at 844.

144 *Id.* at 845.

145 *Id.*

146 *Id.*

147 Padden, *supra* note 134, at 1689.

148 Kuo & Wang, *supra* note 55, at 849.

149 *Id.* (stating that "the public's ability to adhere to the law is enhanced when a court applies *stare decisis* because the public's planning of activities and resolution of disputes will be easier and more reliable).

Hamilton, in The Federalist, referred to *stare decisis* as a "vital component of preserving a jurisprudential system that is not based upon arbitrary discretion."[150] Moreover, in the more recent case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Justices O'Connor, Kennedy, and Souter stated that "*stare decisis* is of fundamental importance to the rule of law because of its self-governing nature."[151] Furthermore, "*stare decisis* is thought to be efficient because it minimizes error costs within the judicial system, it maximizes the public-good aspect of judicial decision-making, and it minimizes the costs of judicial review."[152]

Another advantage of *stare decisis* is that it provides a basis for judicial decision-making when judges do not know the correct answer.[153] "*Stare decisis* enables judges to leverage a single skill – the ability to tell when like cases are alike – into a facility for deciding a wide variety of cases that involve substantive legal issues about which the judges may know next to nothing."[154] In this regard, *stare decisis* allows judges to share information among one another, enabling them to develop areas of comparative advantage.[155] In addition, *stare decisis* enables decision-makers to reduce the uncertainty associated with making decisions because they can compare their analyses with analyses of similar decision-makers.[156] This can be useful in the WTO dispute settlement system because different individuals make up the panels that are chosen for each dispute. This allows decision-makers to conserve resources.[157] It is inefficient for courts to reinvent the wheel for every issue presented. Thus, *stare decisis* helps courts to dispose

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150 *Id.* at 839 (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)).

151 *Id.*

152 Jonathan R. Macey, *The Internal and External Costs and Benefits of* Stare Decisis, 65 CHI.-KENT L. REV. 93, 93-94 (1989).

153 *Id.* at 95.

154 *Id.*

155 *Id.*

156 *Id.* at 102.

157 *Id.* at 103; *see also* Kuo & Wang, *supra* note 55, at 849 (pointing out that *stare decisis* promotes administrative efficiency and judicial restraint and noting that Justice Cardozo explained, "[t]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him").

of cases and to focus their attention on new and unresolved issues.[158] Furthermore, *stare decisis* restrains judges from infusing their own values into their construction and interpretation of the law.[159]

It is true that *stare decisis* is a compromise between the past and the future and reflects the tension between change and stability.[160] Some commentators believe that the "doctrine of *stare decisis* reflects the fundamental values of the legal process and the tension within the common law between change and stability."[161] But in this regard, "change and predictability" do not have to be mutually exclusive.[162] Change and predictability can exist in the same atmosphere at the same time.[163] The most desirable legal systems are those that offer credible promises to the community and respond to new information and changing conditions.[164] While *stare decisis* is a mandatory rule within American jurisprudence, courts have recognized their power to overrule a prior decision.[165]

The strict rule of *stare decisis* provides society with a comprehensive behavioral guide and a feeling of equality by applying the same principles of law to factually similar situations.[166] However, the liberal rule of *stare decisis* is more effective in fostering a useful system of rules that addresses changes in society and accommodates the public's values and

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158 Kuo & Wang, *supra* note 55, at 849.

159 *Id.*

160 *See Religious Liberty and the Bill of Rights: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 1st Sess. 58-59 (1995) (including testimony of Professor Michael S. Paulsen of the University of Minnesota Law School stating that a court should not blindly follow an iniquitous decision instead of correcting it because this can lead to more damage to the justice system than overruling the decision would bring about stability); *see also* Macey, *supra* note 152, at 93.

161 Macey, *supra* note 152, at 93.

162 Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 280 (1985).

163 *Id.* at 281.

164 *Id.* at 280.

165 Todd E. Freed, Comment, *Is Stare Decisis Still the Lighthouse Beacon of Supreme Court Jurisprudence?: A Critical Analysis*, 57 OHIO ST. L.J. 1767, 1770 (1996).

166 Kuo & Wang, *supra* note 55, at 841.

needs.[167]

Some believe that the dispute settlement system under the WTO could operate in a more effective and efficient manner if it included the doctrine of *stare decisis*.[168] Some commentators believe that such a practice fosters "the development of certain legal principles that consistently applied across disputes so as to constitute a 'practice' that can guide future panels and, as such, ensure even greater consistency in the interpretation of a treaty."[169] Furthermore, others believe that other than the WTO Agreements, there is no source of law that is more important than WTO dispute settlement decisions of prior dispute settlement panels including Appellate Body reports.[170] No matter how similar a present dispute is to a prior dispute, the current WTO panel's holding and recommendations can be exactly opposite of the prior holdings and recommendations of a similar dispute.[171]

The absence of *stare decisis* greatly dilutes any "deterrent effect" on WTO members from engaging in similar unsavory tactics and conduct.[172] *Stare decisis* will ensure that parties and non-parties know the legal reach of a panel or Appellate Body Report.[173]

Also related to the problem of the lack of *stare decisis* in WTO dispute settlement is the question of enforcement.[174] "It is said that the WTO's dispute settlement process underscores the rule of law,

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167 *Id.* (stating further that the "liberal rule enables government to overrule obsolete precedent so that the law can account for societal advances, such as technological innovations, the changing role of women in our society, and the presence of greater international relations").

168 Feeney, *supra* note 6, at 112.

169 Venkataraman, *supra* note 128, at 599. "Decisions under the DSU have sought to establish consistency in their interpretation of WTO rules, despite the absence of stare decisis." *Id.* at 600.

170 David Palmeter & Petros C. Mavroidis, *The WTO System: Sources of Law*, 92 AM. J. INT'L L. 398, 400 (1998).

171 Feeney, *supra* note 6, at 107. *See also infra* pp. 26-27 and notes 198-216.

172 *Id.*

173 Bhala, *supra* note 15, at 869 (noting that "whether WTO panel and Appellate body decisions are respected, not only by the parties to a given dispute but by other states considering comparable trade measures, is a gauge by which to measure the commitment of WTO members to a more secure, predictable dispute resolution system").

174 Feeney, *supra* note 6, at 108.

and it makes the trading system more secure and predictable."[175] But is this idea really true?[176] Although the DSB has the power to authorize retaliation when a country does not comply with a ruling,[177] a country does not have to comply with a WTO DSU decision if it would be worse off complying than not complying and accepting the sanctions.[178] In a system without *stare decisis*, adjudicatory decisions cannot guarantee consistency.[179] *Stare decisis* can be a guarantee of something more than mere arbitration.[180] Some scholars believe that the watered down interpretations of DSU panels have enhanced the obligations of the developing countries while enhancing the rights of the developed countries.[181] A system of *stare decisis* would reduce first world – third world tension.[182] In other words, *stare decisis* would reduce the probability that developed countries would use their political and economic power to sway the outcome of a dispute.[183]

It is said that legal rules of courts have two types of economic effects: (1) external to the litigants themselves in the form of the information content of the decision, which provide valuable indicators to future litigants; and (2) actual wealth transfers associated with a particular decision, which are internalized by the parties themselves.[184] *Stare decisis* has the tendency to maximize the external economic effects of a particular decision and

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175 WORLD TRADE ORGANIZATION, *Dispute Settlement Procedures* (Dec. 19, 2002), *available at* http://www.itds.treas.gov/WTO_dispute.htm [hereinafter WORLD TRADE ORGANIZATION].

176 *See* Chakravarthi Raghavan, *The World Trade Organization and its Dispute Settlement System: Tilting the Balance Against the South* (Trade and Development Series No. 9), The World Network, *available at* http://www.twnside.org. (last visited on Feb. 27, 2003) (stating that although the DSU has brought about some degree of predictability and efficiency in the resolution of disputes, the utility of the system in actual operation has fallen short of the initial expectations and euphoria).

177 WORLD TRADE ORGANIZATION, *supra* note 175.

178 Feeney, *supra* note 6, at 108.

179 Bhala, *supra* note 5, at 909.

180 *Id.*

181 *See* Raghavan, *supra* note 176.

182 Bhala, *supra* note 5, at 907.

183 *Id.*

184 William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 236 (1979).

minimize the internal effects.[185] In this regard, *stare decisis* would level the playing field for developing countries because developing countries would know that developed countries would be bound as a matter of international law by prior holdings.[186]

Instituting a rule of *stare decisis* in the WTO dispute settlement process would provide parties and non-parties with an indicator of the legal reach of panel or Appellate Body reports.[187] As such, WTO panel and Appellate Body determinations will be respected by the parties to a given dispute and, further, will be more likely to be respected by other states.[188] This will provide for a more secure, predictable dispute resolution system.[189] It is believed that Members would take the WTO more seriously if panels followed their prior decisions.[190] Moreover, *stare decisis* assures predictability, which translates into security and consistency for the multilateral trading system.[191]

Lastly, in a system where *stare decisis* does not operate, the importance of legal decisions is diminished and can be even negligible.[192]

B. Cons

"Shakespeare was concerned about the mischief that might be done in the name of judicial precedent."[193] Further, Jonathan Swift assails the legal system for taking special care to record all the decisions formerly made against common justice and the general reason of mankind and producing these under the name of precedents . . . as authorities to justify the most iniquitous opinions."[194] This author believes that the pros far outweigh the cons as there are many more reasons to institute a system of *stare decisis* than not.

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185 Macey, *supra* note 152, at 106.

186 Bhala, *supra* note 5, at 907.

187 Steger, *supra* note 126, at 53.

188 *Id.* at 53.

189 *Id.* at 57.

190 *Id.*

191 Bhala, *supra* note 15, at 916.

192 *Id.* at 926.

193 Freed, *supra* note 165, at 1767.

194 *Id.*

C. Case Studies

1. India's Pharmaceutical and Agricultural Chemical Products Patent Procedures

The *stare decisis* issue was raised in the 1998 WTO case dealing with a complaint by the European Community and its member states (EU) regarding the absence in India of patent protections for pharmaceutical and agricultural chemicals that provide for the grant of exclusive marketing rights for such products.[195] In this case, the EU argued that the measure at issue had already been examined by the panel and the Appellate Body in an earlier dispute (WT/DS50) in which the EU was a third party.[196] The EU requested that the panel extend its previous decision to the current decision. The United States recently had brought a similar complaint regarding India's Pharmaceutical and Agricultural chemical products patent procedures.[197] India believed that the panel should have dismissed the EU's complaint, because the EU should have brought its complaint simultaneously with the United States.[198] India argued that successive complaints by different Members on the same matter would have to be examined as separate new cases, which would result in the danger of contradictory decisions and waste of resources.[199] India argued that res judicata did not apply since the parties were different and *stare decisis* did not apply in the WTO to the interpretations of a panel or the Appellate Body.[200] India argued further that the principle of *stare decisis* also did not prevent multiple complaints on the same matter because this principle had not been applied in GATT/WTO jurisprudence.[201] India cited the 1989 GATT Panel on EEC – Restrictions on Imports of Dessert Apples (Complaint by Chile) which noted that a previous panel in 1980 reported on a

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195 World Trade Organization, *India—Patent Protection for Pharmaceutical and Agricultural Products, Complaint by the European Communities and their Member States* WT/DS79/R (1998), *available at* 1998 WTO DS LEXIS, at *3.

196 *Id.* at *22.

197 *Id.* at *23.

198 *Id.* at *25.

199 *Id.* at *26.

200 *Id.* at *28.

201 *Id.* at *29.

complaint involving a similar set of GATT issues but that it "did not feel it was legally bound by all the details and legal reasoning of the 1980 Panel Report."[202] India noted that the issue of the binding nature of panel decisions had arisen in WTO dispute settlement for the first time in the Complaint on Japan – Taxes on Alcoholic Beverages and that panel concluded that panel reports adopted by the GATT contracting parties and the WTO Dispute Settlement Body constitute subsequent practice in a specific case by virtue of the decision to adopt them. However, the Appellate Body reversed this finding and pointed out that Article IX:2 of the WTO Agreement provided that "the Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of the WTO Agreement and of the Multilateral Trade Agreements." The Appellate Body held that this clause provided the only possibility to adopt definitive interpretations.[203]

Because of the EU's request that a prior panel decision be extended to the current matter, the panel thought it necessary to determine "whether, and if so, to what extent it was bound by the reports of Panels and the Appellate Body regarding the same subject matter in the dispute between the United States and India."[204] The panel noted that a number of GATT panels had examined complaints by different contracting parties involving the same or similar measures of a responding party.[205] The panel noted, however, that the issue of whether adopted panel reports are *stare decisis*, had not been directly addressed in any of those cases.[206] The panel noted that "the following passage from the second Tuna report is the only instance where a discussion of *stare decisis* occurs in GATT panel reports":

> In the view of the EEC and the Netherlands, the United States interpretation of the term 'necessary' as meaning 'needed'

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202 *Id.*

203 India - Patent Protection for Pharmaceutical and Agricultural Chemical Products, Complaint by the European Communities and Their Member States, WT/DS79/R; (98-3091), 1998 WTO DS LEXIS, at *3 (stating further that the fact that such an "'exclusive authority' in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere").

204 *Id.* at *168-69.

205 *Id.* at *169.

206 *Id.* at *171.

> amounted to a rejection of adopted panel reports, which constituted agreed interpretations of the General Agreement. The EEC recognized that there was no *stare decisis* in the GATT, if only because there was no hierarchy between courts or arbitral bodies in the GATT. This was also the case for most international courts or tribunals. Nevertheless, such international courts and tribunals were always very careful about maintaining their own precedents and a certain coherence in their decisions. The GATT required such coherence in panel interpretations in order to provide stability within the international trading system.[207]

The panel then noted that the Appellate Body discussed the effect of adopted panel reports in its report on the Japan – Liquor case as follows:

> Adopted panel reports are an important part of the GATT acquis. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.[208]

"The Panel concluded that panels are not bound by previous decisions of panels or the Appellate Body even if the subject-matter is the same."[209] "In examining dispute WT/DS79 the Panel held that it was not legally bound by the conclusions of the Panel in dispute WT/DS50 as modified by the Appellate Body report."[210] The panel stated further, however, that in the course of normal dispute settlement procedure required under Article 10.4 of the DSU, it would take into account the conclusions and reasoning in the panel and Appellate Body reports in WT/DS50.[211] Furthermore, the panel held that in its examination, it believed that it should give significant weight to both Article 3.2 of the DSU, which stresses the role of the WTO dispute settlement system in providing security and predictability to the multilateral trading

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207 *Id.* at *171-72.

208 *Id.* at *173.

209 *Id.*

210 *Id.*

211 *Id.*

system, and the need to avoid inconsistent rulings.[212] As such, the panel held that in its view, these considerations form the basis of the requirement of the referral to the original panel wherever possible under Article 10.4 of the DSU.[213]

Therefore, the panel denied India's request to dismiss the EU's complaint. However, the panel did not state that it would "extend" its prior ruling to the current matter. Nevertheless, the panel held that it would refer to the prior ruling.

2. *Guatemala's Anti-Dumping Measures on Grey Portland Cement from Mexico*

The issue of whether a previous panel report constituted precedent was raised by way of a third-party argument of Ecuador in the case of Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico.[214] In light of the ruling of the Appellate Body in WT/DS60/AB/R, and taking into account the fact that the present dispute was brought by Mexico essentially to resolve the substance of a case that was not resolved by the WTO panel in *Guatemala I*, Ecuador argued that the conclusions, recommendations, and suggestion of the panel in Guatemala WT/DS60/R do not constitute a legal precedent under GATT/WTO practice, and should not be taken into consideration as such.[215] Ecuador asserted that "in international law, it is acceptable for decisions of international bodies adopted in excess of their jurisdiction to be considered void and without legal effect."[216] An example of such an occurrence took place in the case of *Guatemala I*. Ecuador believed that Mexico's suggestion that the panel rely on various precedents of fact and law from the previous procedure is inadmissible and should not be accepted.[217] Therefore, Ecuador felt that Guatemala's request that the panel issue a preliminary decision declaring that it would not take into

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212 *Id.* at *176.

213 *Id.*

214 WT/DS156/R; (00-4282), 2000 WTO DS LEXIS, at *34 (2000) [hereinafter Guatemala].

215 *Id.* at *98-99.

216 *Id.*

217 *Id.*

account the report in *Guatemala I* was relevant.[218]

Mexico requested that the panel endorse the work and the conclusions of the panel in the first dispute (hereinafter *Guatemala I*) and therefore repeatedly quotes the latter's report.[219] The panel stated that "according to Article 11 of the DSU, however, it must respect its obligation to make an objective assessment of the matter and conduct its own review, completely disregarding the report published by the previous Panel."[220] "In *Guatemala I*, the Appellate Body ruled that the Panel which examined the dispute should never have considered the claims submitted to it and rejected its report."[221] The panel held that, "as a result, this report has no value as a precedent, as evidence or as guidance."[222]

Honduras considered that, "if this Panel was guided by the reasoning in the report in the *Guatemala I* case, this would constitute a precedent that would have a negative impact on every WTO Member."[223] Honduras felt that "the report published in the *Guatemala I* case could not even be used simply for guidance, as has sometimes occurred for reports that were not adopted."[224] Honduras argued that "there is a substantive difference between a report that was not adopted by the DSB - whose legal findings have not been rejected - and a report expressly rejected by the Appellate Body; it is clear that a report that has been rejected has no legal existence."[225] Honduras therefore supported Guatemala's request that a preliminary decision be taken declaring that the panel should not take into account the report on the *Guatemala I* case.[226]

The panel considered Guatemala's request that it not take into account its decisions in the report of the panel in *Guatemala - Cement I*.[227] Guatemala argued that the report of the panel in

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218 *Id.* at *99.

219 *Id.* at *136.

220 *Id.*

221 *Id.*

222 *Id.*

223 *Id.* at *136-37.

224 *Id.* at *137.

225 *Id.*

226 *Id.*

227 *Id.* at *407.

Guatemala - Cement I had no legal status and could not constitute a valid precedent because the Appellate Body concluded that the panel did not have the mandate to examine the complaints before it.[228] Thus, Guatemala was of the view that recourse to the report issued in *Guatemala - Cement I* was useful guidance in respect of any matter being examined in the present dispute would be a violation of the decision of the Appellate Body.[229] Guatemala equated the value of the previous panel report to that of an unadopted panel report.[230] Guatemala argued that the previous panel lacked the mandate to review the case.[231] Thus, its opinion on this matter has no legal value as precedent or guidance.[232]

Mexico believed that:

> (a) the arguments presented by it in the present dispute were put before the Panel independently of their having been supported, or not, by a previous panel; (b) the panel report in *Guatemala-Cement I* is an adopted panel report; (c) the panel report in *Guatemala - Cement I* was an integral part of the request for establishment of this Panel and as such is part of its mandate; and (d) assuming *arguendo* that the panel report in *Guatemala-Cement I* was not adopted, it nevertheless contains useful guidance pertinent to the issues before us.[233]

The panel noted "that the Appellate Body ruled in *Guatemala - Cement I* that the dispute was not properly before the Panel, and that it therefore could not consider any of the substantive issues raised in the alternative by Guatemala."[234] "In other words, the Appellate Body found that the panel in *Guatemala - Cement I* should never have reached the substance of the dispute.[235] The panel, therefore, held "that the substantive findings of the panel in *Guatemala - Cement I* were in this respect similar to those of unadopted panel reports, i.e., while they have no legal status, they may nevertheless provide useful guidance to the extent that we

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228 *Id.*

229 *Id.*

230 *Id.*

231 *Id.*

232 *Id.*

233 *Id.* at *408.

234 *Id.*

235 *Id.*

consider them relevant and persuasive."[236] The panel noted Mexico's assertion that its arguments in this dispute were before the panel independently of their having been supported, or not, by a previous panel.[237]

VIII. How to Institute *Stare Decisis* in the WTO Dispute Settlement Process

The DSB grapples seriously with separation of powers. As pointed out previously, the General Council reports to the Ministerial Conference. Therefore, it becomes problematic for the DSB, which is an arm of the General Council to interpret the General Agreement. But *stare decisis* does not apply to the Agreements of the WTO Members; it applies to the rules governing dispute settlement adjudication. The separation of powers issue can be easily alleviated by instituting rules within the DSU governing *stare decisis*. In the American common law system of *stare decisis* there is a line of demarcation between common law and statutory analysis. As such, courts treat *stare decisis* regarding constitutional law differently than it treats *stare decisis* regarding statutory law. This author suggests a somewhat similar proposition regarding a system of WTO *stare decisis* but not as great. In this regard, there should be a clear line of demarcation between issues regarding the Agreements and issues regarding the WTO rules. If the Agreements are compared to statutes in the American legal system and WTO rules are compared to the common law, this author suggests that WTO decision-makers would not go so far as to interpret the Agreements, but rather only the WTO rules.

The American common law system of *stare decisis* includes doctrines of vertical and horizontal *stare decisis*. The DSB should require that future panels rely on Appellate Body decisions.[238] As stated above, it is believed that there is no source of law that is as important in WTO dispute settlement as the reported decisions of prior dispute settlement panels, including WTO panels and reports

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236 *Id.* at *408-09.

237 *Id.* at *409.

238 Bhala, *supra* note 5, at 853 (suggesting that the WTO Agreement and the DSU should include Appellate Body reports as a source of international trade law).

of the Appellate Body.[239] The international legal society should admit that the holdings of the Appellate Body and panel reports are sources of international law. Because of the problems discussed infra that plagued GATT, this author does not advocate the use of prior GATT panel reports in a WTO dispute settlement system of *stare decisis*. This author believes that unadopted decision reports should not be relied upon because they have no legal status in the GATT or WTO systems.[240]

IX. Conclusion

The international legal system is not fond of the common law jurisprudence which mandates that courts operate under a strict precedent or *stare decisis* rule of law. *Stare decisis* is a principle common to Anglo-American jurisprudence and civil law systems. *Stare decisis* is so attractive because it facilitates a system of information transferred between judges, litigants and lawyers.[241] It allows the participants to feel that they are more a part of the decision-making process and more in control. This author does not suggest that an American, common law way of thinking should be imposed on WTO dispute settlement. However, this author strongly believes that such a system would promote increasing certainty and fairness, which would translate into ensuring that the problems of the past GATT dispute settlement system are not created again in the WTO dispute settlement process.

Although the WTO dispute settlement flirts with *stare decisis*, the reports and decisions are not binding. It is believed that a system of binding precedent within the WTO dispute settlement process will require a great deal of time to develop, as it is thought that it would be difficult for the WTO to pass legislation that would make international trade law dispute decisions binding when the WTO itself is not binding.[242] Furthermore, the WTO believes that its process of assigning persuasive effect to decisions

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239 Palmeter & Mavroidis, *supra* note 170, at 400 (arguing that the text of WTO Agreements is most important and after that, then prior dispute rulings).

240 Pierre Pescatore, *Drafting and Analyzing Decisions on Dispute Settlement*, *in* 1 HANDBOOK OF WTO/GATT DISPUTE SETTLEMENT PT. 2, 31 (1998).

241 Macey, *supra* note 152, at 93.

242 Feeney, *supra* note 6, at 114.

is a system that works. However, the WTO does not have to follow this process and may cast it aside whenever it becomes convenient. Such a system provides little in the way of concrete stability and exposes the DSB to the ills that befell the GATT dispute settlement process. If and/or until the system is changed, it is hoped that WTO Panels and the Appellate Body will adhere to the practice of considering previous decisions persuasive.